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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SANGAMON VALLEY TELEVISION CORPORATION
AND
STATE OF ILLINOIS,
Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, ILLIANA TELECASTING CORPORATION, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., PLAINS TELEVISION CORPORATION, AND METROMEDIA, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., PLAINS TELEVISION CORPORATION, and METROMEDIA, INC. IN OPPOSITION

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IN THE

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No. 700

SANGAMON VALLEY TELEVISION CORPORATION

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v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, ILLIANA TELECASTING CORPORATION, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., PLAINS TELEVISION CORPORATION, AND METROMEDIA, INC.,

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OPINIONS BELOW

The opinion of the court below (Pet. App. pp. 1a-21a) is reported at 324 F. 2d 379. The Report and Order of

the Federal Communications Commission (J.A. 303-332) which the court there affirmed is unofficially reported in 23 Pike and Fischer, *Radio Regulation* 1579 (1962).

JURISDICTION

The judgment of the court of appeals was entered June 27, 1963. A petition for rehearing en banc filed by Sangamon Valley Television Corporation was denied on September 25, 1963; a like petition by the State of Illinois was denied on November 6, 1963. The joint petition for certiorari was filed on December 24, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether rule-making action of the Federal Communications Commission substituting UHF channels 26 and 36 for VHF channel 2 in Springfield, Ill., a predominantly UHF area, and shifting the thus deleted VHF channel to St. Lous, Mo. and Terre Haute, Ind., predominantly VHF areas, with a view to encouraging "the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303(g)), violates Section 307(b) of the Communications Act (47 U.S.C. Sec. 307 (b)).

STATUTE INVOLVED

Section 303(g) and Section 307(b) of the Communications Act of 1934, as amended (47 U.S.C. Secs. 303(g) and 307(b)) provide:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> * * * *
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage

the larger and more effective use of radio in the public interest;

* * * * *

Sec. 307 . . .

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

STATEMENT

The instant joint petition arises from the Commission's Report and Order of July 18, 1962 (J.A. 303-332) "deintermixing" Springfield, Ill., St. Louis, Mo. and Terre Haute, Ind.—by substituting UHF channels 26 and 36 for VHF channel 2 in Springfield (a predominantly UHF area), and by shifting VHF channel 2 to St. Louis and Terre Haute (predominantly VHF areas where UHF allocations made in 1952 have not been providing a "radio service"). That rule-making action, as affirmed by the court below, has its antecedents which explain and (undersigned respondents believe) fully justify the result there reached.

In its spectrum allocation report in 1945 the Commission recognized that the 13 VHF channels (later reduced to 12), which it there set aside for commercial television use, were insufficient to provide a nationwide competitive television system, and accordingly reserved a substantial portion of the UHF band for *experimental* television purposes.[1] In its Sixth Report of April 14, 1952, issued after

[1] Report in FCC Docket No. 6651, Mimeo 82387, May 1945 (see 1 Pike and Fischer, *Radio Regulation*, Pt. III, pp. 91:96-98, hereinafter cited as —— RR ——).

a four-year study (1948-1952), the Commission added 70 UHF channels (channels 14 through 83) to the 12 VHF channels (channels 2 through 13) for regular television broadcast purposes.[1] Basic to this report was the assumption (then justified but disproved by subsequent developments) that the "intermixture" and utilization of VHF and UHF channels in the same major markets would result in the manufacture of nothing but all-channel receivers (para. 189), and that the new UHF channels would thus become in due course, with only 15 million VHF receivers then in use, "an integral part of a *single*, nationwide television service" (para. 197).[2]

As a concomitant part of its Sixth Report, the Commission promulgated a detailed allocation table (now Rule 73.606, 1 RR 53:606) designed to provide an aliquot share of television assignments to each of the several states and communities (47 U.S.C. Sec. 307(b)). There is was concluded that St. Louis needed six commercial facilities, Springfield, two, and Terre Haute two—a determination from which petitioners at that point sought no review. In line with its 1952 intermixture concept, three of the six commercial assignments to St. Louis were in the VHF band (channels 4, 5, and 11) and three in the UHF band (channels 30, 36, and 42). In like fashion one VHF and one UHF channel were allocated to Springfield (channels 2 and 20), and one VHF and one UHF to Terre Haute (channels 10 and 63) for commercial use.

Within two years after the issuance of the Sixth Report it became painfully apparent to large segments of

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[1] See Sixth Report of April 14, 1952, 1 RR Pt. III, 91:606-607 (para. 22).

[2] Sixth Report of April 14, 1952, 1 RR Pt. III, 91:661-665 (emphasis supplied throughout this brief). As we shall see, the intermixture feature of the Sixth Report was subsequently repudiated by the Commission in its Report and Order of June 26, 1956 in FCC Docket No. 11532 (13 RR 1571), a fact which petitioners choose to ignore (cf. Pet. pp. 6, 16).

the broadcast industry that the policy of intermixing VHF and UHF channels in the same markets was not producing the competitive pattern which the Commission had originally intended. For example, within weeks after the *second* VHF station went on the air in St. Louis in 1954, two UHF stations in that large market folded. In the smaller Terre Haute market, where a VHF applicant succeeded in obtaining a prompt uncontested grant, there were no "takers" thereafter for the UHF channel. However, in Springfield, where three UHF applicants merged and obtained a grant on UHF channel 20, while Sangamon Valley and another applicant were delayed by a comparative hearing for channel 2, the UHF station in Springfield (Station WICS licensed to respondent Plains Television Corporation) was providing a highly satisfactory television service.

In short, in *large* markets on the advent of a *second* VHF operation and in *small* markets on the advent of a *first* VHF station, it soon became all too clear that the UHF stations were folding and that the UHF channel assignments in such markets were going "begging"—being nothing more than "paper allocations" and not "radio service" contemplated by 47 U.S.C. Sec. 307(b). Unless corrective steps were taken, it was evident that some 70 UHF channels would go to waste.[1]

After much vacillation and considerable prodding by Congressional committees, the Commission finally concluded in its Second Deintermixture Report of June 26, 1956 in FCC Docket No. 11532 (13 RR 1571) that intermixture was not producing an integrated television system, that the 12 VHF channels were insufficient for a "fully competitive television system" (13 RR 1571,

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[1] The reasons for the inability of UHF stations to compete with VHF stations in markets blanketed by VHF signals were briefly summarized by the court below in a footnote to the instant opinion (Pet. p. 5a, fn. 3).

1575, para. 12), that VHF operations were thwarting the development of a satisfactory service on UHF in a number of markets, and "that the intermixture of UHF and VHF channels was, on a nation-wide basis, a failure".[1]

Pending a further study of the advisability and feasibility of moving all television into the UHF band (thus eliminating the intermixture problem), the Commission also concluded (as an interim measure) that it would re-examine its 1952 allocations with a view to determining, on a case-to-case basis, whether the deletion of VHF channels in predominantly UHF areas would "improve the opportunities for effective competition among *a greater number* of stations" (13 RR 1571, 1581, para. 31). To that end the Commission, concurrently with its June 26, 1956 Report, instituted some 13 rule-making proceedings designed to "deintermix" a number of areas where it appeared that UHF (if not stifled by VHF competition) would provide a satisfactory service (see 13 RR 1571, 1583-1584).[2] Among the proceedings thus instituted was one (FCC Docket No. 11747) to remove VHF channel 2 from Springfield, substituting two additional UHF channels therefor, and utilizing channel 2 in St. Louis, a market obviously destined to become all VHF and in need of additional television service.[3]

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[1] See *Jacksonville Journal Co. v. Federal Communications Commission*, 101 U.S. App. D. C. 12, 13, 246 F. 2d 699, 700 (1957).

[2] The 13 markets where deintermixture proceedings were instituted, deprecatingly labeled by petitioners as a "small number" (Pet. p. 7), included Springfield-St. Louis, Peoria-Moline, Albany-Schenectady-Troy, Hartford-Providence, Madison-Rockford, New Orleans, Evansville-Louisville, Fresno, Bakersfield, etc.

[3] The subsequent inclusion of Terre Haute can scarcely be termed an "afterthought" (cf. Pet. p. 7, fn. 10). As early as 1955 ABC had suggested that channel 2 be deleted from Springfield and assigned to Terre Haute as well as St. Louis.

After studying the voluminous comments filed by interested persons in FCC Docket No. 11747, the Commission on March 1, 1957 released a Report and Order (22 FCC 318) in which it found (in line with the five criteria spelled out in its Second Deintermixture Report) that the deletion of channel 2 from Springfield would not result in any significant number of people being deprived of a television service (para. 11); that several stations were providing a UHF service to the area, including Station WICS in Springfield, Station WTVP in Decatur, and Stations WEEK-TV and WTBH in Peoria (para. 8); that 85%-100% of the sets in the nine counties around Springfield were capable of receiving UHF signals (para. 9); that the flat terrain of central Illinois was ideally suited to UHF propagation (para. 10); and that the deletion of channel 2 would result in more rather than fewer television services in the Springfield-Decatur area (para. 24).

In subsequently seeking judicial review under 47 U.S.C. Sec. 402(a), Sangamon Valley raised a single issue—whether the Commission's Report and Order deintermixing Springfield-Terre Haute-St. Louis contravened 47 U.S.C. Sec. 307(b). From a per curiam affirmance of the Commission's 1957 Report (*Sangamon Valley Television Corporation* v. *United States*, 103 U.S. App. D.C. 113, 255 F. 2d 191 (1958)), Sangamon Valley petitioned for certiorari (No. 235, Oct. Term 1958).

Though certiorari was granted and the case remanded, this Court made it abundantly clear that its action was based not on the ground which Sangamon Valley had urged, but on intervening matters which the Solicitor General had brought to this Court's attention in his brief in opposition, namely, subsequently disclosed testimony before a House legislative committee that the 1957 Report and Order may have been tainted by ex

parte approaches of one or more participants therein. *Sangamon Valley Television Corporation* v. *United States*, 358 U.S. 49 (1958).

Following remand to the court below and thereafter to the Commission, it was ultimately determined in 1961 to institute an entirely new rule-making proceeding (FCC Docket 14267) to deintermix these markets (J.A. 6-7). Respondent American Broadcasting-Paramount Theatres, Inc. (ABC), as a nationwide television network interested in multiple competitive facilities in as many markets as possible; respondent Plains Television Corporation (Plains), as the licensee of UHF Station WICS in Springfield; and respondent Metromedia, Inc. (Metromedia), as the licensee of UHF Station WTVP in Decatur, along with several other interested persons, filed comments supporting the deintermixture proposal (J.A. 305-307).

After studying the subsequently submitted comments, the Commission by Report and Order adopted July 18, 1962 (J.A. 303-332, 23 RR 1579) again found, as it had in 1957, that the existing pattern of television service in the Springfield-Decatur-Peoria area is "predominantly UHF" (para. 19), that the nearest VHF stations are 78 and 86 miles away (para. 20), that the Springfield area is well suited terrain-wise for propagation and reception of UHF television signals (para. 18), that "UHF can provide, and is providing, a satisfactory broadcast service" in the Springfield area (para. 18), that the utilization of channel 2 in Springfield (thus introducing a second VHF signal into that market) would "preclude the possibilities for a fuller development of diversified television services in this area *in the near future* and cause a serious deterioration in existing UHF services" in central Illinois (Springfield-Decatur-Peoria) (para. 29), and that the failure to activate channel 2 in Springfield will not deprive anyone of an existing

service, nor in fact result in any area lacking a "satisfactory television signal", as evidenced by existing television set saturation figures for counties which Sangamon classified as potential "white areas" if Channel 2 were not utilized in Springfield (paras. 31-34).

The Commission further found that an immediate and important by-product of not using channel 2 in Springfield would be its availability for reassignment to Terre Haute where it would provide a second competitive local service and to St. Louis where it would provide a needed fourth facility (paras. 42-51).[1] The Commission accordingly concluded in its Report and Order of July 18, 1962 that channel 2 should be deleted from Springfield (with two UHF channels substituted therefor), and that it should be assigned to both Terre Haute and St. Louis (J.A. 303-332, para. 67).

On petition for review Sangamon Valley again contended that the Commission's action contravened 47 U.S.C. Sec. 307(b).[2] Pursuant to 5 U.S.C. Sec. 1038, respondents ABC, Plains, and Metromedia intervened in support of, and the State of Illinois in opposition to, the Commission's Report and Order. The court below again affirmed (Pet. App. pp. 1a-21a) and thereafter unanimously denied en banc review.

ARGUMENT

As borne out by the record (see J.A. 9-146) and the Commission's findings (J.A. 309-314, 321-325), the

[1] A number of similarly sized markets, several of which are smaller than St. Louis, have four commercial VHF operations (e.g. Denver, Minneapolis-St. Paul, Dallas-Ft. Worth, San Antonio, Portland, Washington, etc.).

[2] Neither in the court below nor here has Sangamon Valley assigned as error the Commission's subsequent determination that the approaches during the earlier proceeding were not of a character to disqualify Signal Hill as a television licensee. Thus, despite "coloring" resorted to by Sangamon Valley (Pet. pp. 8-12), undersigned respondents see no reason to comment on these side issues.

deintermixture action here taken by the Commission in 1957 and again in 1962 has resulted and will result in more rather than fewer services, not only in Terre Haute and St. Louis but also in central Illinois (Springfield-Decatur-Peoria):

Station WICS licensed to respondent Plains and an affiliate of NBC has been providing a television service to Springfield and its environs on UHF since September 1953 (cf. Pet. p. 6). Following the repudiation by the Commission of its 1952 intermixture concept in its Report of June 26, 1956 (13 RR 1571) and the issuance of its 1957 Reports and Orders deintermixing Springfield and Peoria (22 FCC 318, 22 FCC 342), WICS erected a taller tower and increased its power some 20-fold (J.A. 312). In April 1959 Plains established a UHF semi-satellite operation in Champaign, Ill. (Station WCHU), by which many of the programs broadcast by Station WICS from the capital of Illinois are made available to the Champaign-Urbana area, thus providing some competition for VHF Station WCIA (Ch. 3) in that market (J.A. 312). And in 1960 Plains acquired the UHF station in Danville, Ill. and has continued to provide that community with a station of its own (J.A. 312).

Also, as a result of the Commission's 1956-1957 deintermixture actions, a third UHF station (WMBD-TV) was placed on the air in Peoria in January 1958 (cf. J.A. 311). UHF Station WEEK-TV in Peoria established a satellite UHF operation in La Salle, Ill. (Station WEEQ-TV) in November 1957, and UHF translators have since been installed in La Salle by the other Peoria stations (J.A. 311). Station WTVP, now licensed to respondent Metromedia, has continued to serve the Decatur-Springfield area on UHF (as an ABC affiliate), and its programs are now available in Champaign-Urbana via a UHF translator (J.A. 312). And with the

termination of the instant litigation, there is every reason to believe, in the light of what happened in Peoria and in view of the pendency of two applications for UHF channel 26, that Springfield will in due course have a second station of its own on the UHF channels which have been substituted for channel 2 (cf. J.A. 311).[1]

A further by-product of the Commission's 1957 and 1962 actions is an increase in the number of television services elsewhere. Channel 2 is already providing a fourth commercial (non-network) service in the large St. Louis market.[2] And although UHF channel 63 had been going begging in Terre Haute, after the only V in that market was activated in 1954, thus creating a monopoly situation, the allocation of another VHF channel to Terre Haute has already resulted in a rash of applications to provide a second competitive service in that market. Cf. *Fort Harrison Telecasting Corp.* v. *United States*, 324 F. 2d 379, 386-387 (C.A.D.C. 1963).

Thus, by deintermixing Springfield (and Peoria) in 1957, action which the Commission reaffirmed after an entirely new rule-making proceeding in 1962, UHF stations and services in central Illinois have survived and multiplied, notwithstanding the presence of *one* wide-

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[1] With the uncertainty which has prevailed since 1957 as to whether VHF channel 2 is or is not to be activated in Springfield, it is not surprising that potential UHF operators have been slow to risk a half-million dollars on a second UHF station in that market until such uncertainty is removed. The fact that two applicants have filed for UHF channel 26 would seem to refute petitioners' assertions (Pet. p. 8, fn. 11, p. 17) that the new UHF assignments will not be activated in Springfield.

[2] Contrary to Sangamon Valley's assertion (Pet. p. 3, fn. 3) that "the addition of Channel 2 to St. Louis left 220 Television without a network", Signal Hill Telecasting Corporation was already operating on channel 2 in St. Louis (April 1957), as an ABC affiliate, before 220 Television acquired a VHF channel in St. Louis. See *St. Louis Amusement Co.* v. *Federal Communications Commission*, 104 U.S. App. D. C. 45, 46, 259 F. 2d 202 (1958), cert. den. 358 U.S. 894 (1958).

coverage VHF signal in that general region (Station WCIA on channel 3 in Champaign). If a second wide-coverage VHF facility were activated in central Illinois (on VHF channel 2 in Springfield), WICS would lose its network affiliation (NBC) and hence the necessary programming, audience, and revenues with which to operate. This in turn would spell the end of its UHF satellite operation in Champaign and its marginal operation in Danville. Furthermore, past experience in comparable situations uniformly shows that a second wide-coverage VHF service in Springfield would jeopardize if not destroy Metromedia's UHF operation in Decatur (see J.A. 313-315).

In short, by removing channel 2 from Springfield and reassigning it to both Terre Haute and St. Louis, the following improvements in the number of competitive television services have already occurred or are in the immediate offing—Terre Haute will have two stations rather than one (both VHF); St. Louis, a market originally deemed important enough to merit six commercial facilities, will have four instead of three such operations (on VHF); Springfield, instead of being limited to one facility (on VHF), will have at least two stations (on UHF); Decatur and Danville will continue to have stations of their own on UHF; Champaign will continue to enjoy a second competitive service; the three UHF Peoria stations and a UHF satellite in La Salle will not be endangered by a second wide-coverage VHF operation in central Illinois (J.A. 315).

Despite these beneficent results from not utilizing channel 2 in Springfield—of more rather than fewer television facilities in Terre Haute, in St. Louis, and in numerous cities in central Illinois—petitioners argue that the Commission was foreclosed *as a matter of law* from taking the action which it did by reason of Section 307 (b) of the Act (Pet. pp. 14-24). Petitioners would place

a construction on that section which would preclude the Commission from deintermixing *any* market. Notwithstanding the admitted fact that the 12 VHF channels are not enough to provide a nationwide competitive system, and notwithstanding the fact that UHF channels become "paper allocations" in markets the size of Springfield, when a VHF station commences operating therein, petitioner says that a VHF channel must be assigned to Springfield by reason of Section 307(b), regardless of the public interest consequences and even though such action will mean fewer services rather than more services.[1]

The Communications Act puts the Commission in no such straight jacket. Section 303(g) of the Act confers on the Commission the responsibility of encouraging "the larger and *more effective use of radio* in the public interest" (47 U.S.C. Sec. 303(g)). Section 307(b) in turn requires the Commission to so distribute licenses, frequencies, hours of operation and power among the several states and communities "as to provide a fair, *efficient*, and equitable distribution of *radio service*" (47 U.S.C. Sec. 307(b)). Unused UHF allocations which exist only on paper do not constitute "radio service". Since these two sections of the same statute must be read in *pari materia*, neither should receive a gloss which needlessly nullifies the ultimate standard laid down by Congress—"public

[1] Despite petitioners' contrary assertions (Pet. pp. 13, 16-17, 19), the Commission has never sought "equality" in the channel assignments to a given community for the sake of "enhancing the competitive positions of individual station operators". The Commission's concern has been in seeing that a given market which could well support 3 stations (either UHF or VHF) and which is entitled to that many diverse program sources is not in fact restricted to a single facility in situations (as here) where it is not possible, with only 12 VHF channels to work with, to allocate more than one VHF station thereto, and where, because of VHF's highly advantageous competitive position, one such operation on VHF (with other outside VHF signals) would destroy all UHF competition in that particular market.

interest, convenience, and necessity" (47 U.S.C. Sec. 307 (a)). See *Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App. D. C. 342, 344-345, 210 F. 2d 24 (1954).

Thus, an intermixed system which transforms UHF assignments into "paper allocations" does not encourage the "larger and more effective use of radio" (Section 303(g)). An intermixed system is not "efficient" nor does it result in a fair and equitable distribution of "radio service" when the net effect of the VHF allocation is to blot out one or more existing UHF operations (Section 307(b)).[1] In short, a policy of deintermixture, which results in more rather than fewer television services, instead of contravening Section 307(b) of the Act, gives full effect to the Congressional mandates embodied in Sections 303(g) and 307(b).

The Commission's authority, by prior rule-making, to set aside one class of frequencies for "communities" of one type and a different class of frequencies for "communities" of another, despite Section 307(b) objections interposed thereto, has long been sustained in AM proceedings. See *Huntington Broadcasting Co.* v. *Federal Communications Commission*, 89 U.S. App. D. C.

[1] The "radio service" which the Commission is under a duty to distribute efficiently and equitably embraces not only "coverage" but also "origination facilities". *WSIX Broadcasting Station*, 8 RR 216, 217-218 (1952); *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 362 (1955). The Commission's priorities contemplate at least one signal to as much of the United States as possible (Priority 1), at least one "mouth-piece" of their own to communities of substantial size (Priority 2), and *multiple* transmission and reception services throughout the United States on such frequencies as remain (Priorities 3-5). In short, the Commission has quite properly looked askance at any allocation pattern which would create a monopoly situation by limiting substantial-sized markets to a single outlet of their own. As found by the Commission this could well be the situation if VHF channel 2 were activated in Springfield (J.A. 314-315).

222, 192 F. 2d 33 (1951); cf. 47 U.S.C. Sec. 303(a) (b) (c) and (d). Thus, in deciding to make greater use of UHF channels in areas where UHF is providing a satisfactory service, and to shift VHF channels from such areas to VHF markets where UHF cannot in the immediate future provide a competitive service, the Commission did not exceed its statutory authority. Where there is "a reasonable factual and legal basis" for the Commission's action, "it is for the Commission, not the courts, to pass on the wisdom of the allocation scheme". *Coastal Bend Television Co. v. Federal Communications Commission*, 98 U.S. App. D. C. 251, 255, 234 F. 2d 686 (1956).

The Commission's authority by rule-making to allocate particular frequencies to given communities by a table of assignments, rather than on the basis of hit-or-miss applications, is likewise well established. *Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App. D. C. 342, 210 F. 2d 24 (1954); see 28 Fed. Reg. § 73.606. The action here complained of was rule-making action (J.A. 6; see 28 Fed. Reg. § 73.607; cf. Pet. p. 14). As made clear by the Administrative Procedure Act, where rule changes are effectuated by rule-making, "a concise general statement of their basis and purpose" suffices (5 U.S.C. Sec. 1003(b)). Thus, the elaborate Report and Order here issued by the Commission far exceeds the minimal requirement of the APA and would in fact suffice even in an adjudicatory proceeding. Cf. *Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App. D. C. 342, 345-346, 210 F. 2d 24 (1954).

In sum, except for one matter yet to be mentioned, the instant joint petition relies on the same cases (cf. Pet. pp. 9 and 15) and makes the same arguments which this Court seemingly rejected in 1958 (358 U.S. 49). The one new matter is the "all channel" receiver legislation enacted July 10, 1962 (see 47 U.S.C. Sec. 301(s)).

The ban imposed by the 1962 statute on the shipment in interstate commerce of sets not equipped to pickup both VHF and UHF signals does not become effective until May 1, 1964, and will not apply to sets theretofore manufactured nor to the more than 50 million VHF sets already in the hands of the public. Since many VHF-only sets in use when that ban becomes effective will still have an operating life of another six years or more, it will be 1970 or later before UHF can hope to make much inroad into areas which otherwise receive the programs of all three networks *on VHF*. In the meantime, the differences in UHF and VHF coverage and the advertisers' preference for VHF cannot be ignored. Thus, for all practical purposes, if the Commission had activated a second wide-coverage VHF facility in central Illinois on July 18, 1962, eight days after the all-channel receiver legislation was enacted, the *immediate* consequences of such action on the number of UHF stations now operating in that area would have been no less disastrous than such action taken before the all-channel receiver legislation was enacted.

The 1962 legislation was duly considered by the Commission in the Report and Order here challenged (J.A. 318-320) and ir turn by the court below (Pet. App. pp. 10a-11a). With all deference to petitioners, Congress did not there repudiate "deintermixture". It did suggest that the Commission declare a moratorium on then pending proposals to delete *operating* VHF stations from markets with one or more UHF stations, so as to give the all-channel receiver legislation a fair trial. The disruptive considerations which militated against deleting an *operating* V, and which moved Congress to ask that such proceedings be held up in 8 markets, similarly dictated, if status quo was the desideratum, that channel 2 (heretofore unused) *not* be activated in Springfield. The special situation in Springfield was expressly brought to the attention of Congress prior to the enactment of the

all-channel legislation and the release by the Commission of the instant Report and Order. See H. R. Rep. No. 1559, 87th Cong., 2d Sess., 7-8, 21, 22-26, and S. Rep. No. 1526, 87th Cong., 2d Sess., 6-7, 14, 15-19.

CONCLUSION

The Commission's rule-making action here challenged was properly affirmed by the court below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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